Faizal bin Osman v Neelakandan a/l Manarsamy

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–12 OF 2005
BALIA YUSOF J
4 SEPTEMBER 2008

Civil Procedure — Appeal — Appeal against decision of sessions court — Failure by sessions judge to properly assess evidence — Failure to make a positive finding on two sets of conflicting evidence — Failure to consider demeanour of witness — Whether appellate intervention warranted

The plaintiff was injured in an accident between his motorcycle and a car. The accident happened late at night. The road was unlit at the material time. Nevertheless, the plaintiff was able to see the number plate of the car in question and was also able to identify the nationality of the driver of the said car. The plaintiff subsequently sued the defendant — the registered owner of the car for damages in respect of injuries and losses sustained in the accident. The defendant admitted that he was indeed the registered owner of the said car but denied that his car had been involved in the accident. The defendant claimed that on the date and time of the accident, his car was parked at his house with its key kept personally by him. No one else could have used his car that particular night, said the defendant. He further claimed that only realised that his car was involved in an accident when he attempted to renew its road tax at the JPJ. At first instance, the sessions' court judge entertained doubts concerning both the plaintiff's and defendant's evidence. She then held that as the court was doubtful whether the defendant's car was involved in the accident, the plaintiff's claim ought to be dismissed. The plaintiff appealed to the High Court.

Held, allowing the appeal with costs:

(1) Appellate intervention was warranted in the instant case. It was clear that the sessions' court judge failed to make any conclusion as to the evaluation of the evidence by the witnesses. There was no rejection and/or acceptance of the evidence and the reason for such rejection or acceptance. Judicial evaluation of the whole evidence in the case was absent. Non-consideration of relevant evidence constituted 'insufficient judicial appreciation of relevant evidence'. The judge's failure to

consider other circumstances which constituted relevant evidence was a serious flaw in her decision and would merit appellate interference (see para 4).

(2) The improbability of the defendant's evidence and likewise his demeanour had not been fully evaluated and appreciated by the trial judge. She had also failed to evaluate the defendant's evidence regarding the discrepancy in his evidence relating to how he came to know about the accident — there clearly being a contradiction between his statutory declaration and his police report. The trial judge had failed to critically test the evidence of the parties against the totality of their evidence and had not properly analysed the entirety of the evidence which was given before her (see para 7).

(3) In the instant case, the sessions' court judge had definitely not taken advantage of having heard and seen the witnesses herself. The instant appeal was one of such cases where the court was at liberty to intervene and form its own view on the whole of the evidence available (see paras 11 & 13).

[Bahasa Malaysia summary

Plaintif mengalami kecederaan dalam kemalangan antara motosikalnya dan sebuah kereta. Kemalangan tersebut berlaku lewat malam. Jalan tidak berlampu pada masa material. Namun begitu, plaintif dapat melihat nombor plat kereta yang dipersoalkan dan dapat juga mengenal pasti bangsa pemandu kereta tersebut. Plaintif kemudiannya telah menyaman defendan — pemilik berdaftar kereta itu untuk ganti rugi berkaitan kecederaan dan kerugian yang dialami dalam kemalangan itu. Defendan mengakui yang dia sememangnya pemilik berdaftar kereta tersebut tetapi menafikan yang keretanya terlibat dalam kemalangan itu. Defendan mendakwa pada tarikh dan masa kemalangan itu, keretanya diletakkan di rumahnya dan kuncinya disimpan sendiri olehnya. Dia juga mendakwa hanya menyedari yang keretanya terlibat dalam kemalangan apabila dia cuba memperbaharui cukai jalan rayanya di JPJ. Hakim mahkamah sesyen pada mulanya telah meneliti keraguan berkaitan keterangan kedua-dua plaintif dan defendan. Beliau kemudiannya memutuskan bahawa memandangkan mahkamah ragu-ragu sama ada kereta defendan terlibat dalam kemalangan itu, tuntutan plaintif patut ditolak. Plaintif telah merayu ke Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Campur tangan mahkamah rayuan diwajarkan dalam kes ini. Ia jelas hakim mahkamah sesyen gagal membuat apa-apa kesimpulan berhubung penilaian keterangan saksi. Tiada penolakan dan/atau

penerimaan keterangan dan alasan untuk penolakan atau penerimaan sedemikian. Tidak ada penilaian kehakiman keseluruhan keterangan dalam kes ini. Keterangan relevan yang tidak dipertimbangkan membentuk 'insufficient judicial appreciation of relevant evidence'. Kegagalan hakim mempertimbangkan keadaan lain yang membentuk keterangan relevan merupakan kecacatan serius dalam keputusannya dan mewajarkan campur tangan mahkamah rayuan (lihat perenggan 4).

(2) Keterangan defendan yang tidak dapat dipercayai dan juga perilakunya tidak dinilai dan disedari sepenuhnya oleh hakim perbicaraan. Beliau juga gagal untuk menilai keterangan defendan berhubung percanggahan dalam keterangannya berkaitan bagaimana dia mengetahui tentang kemalangan itu — jelas terdapat percanggahan antara deklarasi statutorinya dan laporan polisnya. Hakim perbicaraan telah gagal menguji secara kritikal keterangan pihak-pihak terhadap keseluruhan keterangan mereka dan tidak menganalisis sewajarnya keseluruhan keterangan yang dikemukakan di hadapannya (lihat perenggan 7).

(3) Dalam kes ini, hakim mahkamah sesyen tidak langsung mengambil kelebihan untuk mendengar dan melihat sendiri saksi-saksi. Rayuan ini adalah salah satu kes di mana mahkamah bebas untuk campur tangan dan membentuk pendapatnya sendiri tentang keseluruhan keterangan yang sedia ada (lihat perenggan 11 & 13).]

Notes

For cases on appeal against decision of sessions court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 682–683.

Cases referred to

Armagas Ltd v Mundogas SA; The Ocean Frost' [1985] 1 Llyod's Rep 1 (refd)
Benmax v Austin Motor Co Ltd [1955] AC 370 (refd)
Chow Kok Beng v Choo Kok Hoe & Ors [1998] 2 MLJ 29 (refd)
Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465 (refd)
Gotham Construction Co v Amulya Krishna AIR 1968 Calcutta 91 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57 (refd)
Mst Chameli Debi v Purusattam Singh AIR 1974 Calcutta 316 (refd)
Putra v Sivagnanam & Anor [1959] 25 MLJ 259 (refd)
Ratna Ammal v Tan Chow Soo [1966] 2 MLJ 294 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Sheo Swarup & Ors v The King Emperor 51 TLR 10(c) (refd)
State of Rajasthan v Hanuman AIR 2001 SC (refd)

Tek Chand v Dide Ram AIR 2001 SC 905 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Woon Ngee Yew & Ors v Ng Yoon Thai & Ors [1941] MLJ 37 (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183 (refd)

Brijnandan Singh (Brijnandan Singh Bhar & Co) for the appellant.
Sunita Kaur (Ajmer, Sandhu & Ong) for the respondent.

Balia Yusof J:

[1] The appellant in the present case brought an action against the respondent in the George Town Sessions Court for damages suffered arising from a motor vehicle accident on 23 April 2000. His claim was dismissed by the learned session judge with costs and hence this appeal.

BACKGROUND FACTS

[2] At about 11.25pm on 23 April 2000 the appellant was riding his motorcycle from Jalan Kelawei towards Tanjung Tokong. At the same time he realised a Proton Wira some what golden in color being driven alongside on his left going in the same direction as his. Suddenly, the said car made a U turn in front of him and resulting him knocking into the right rear door of the said car. The appellant fell with his motorcycle on top of him. According to him the road was dark and without lights but he could see the car's number plate being PCT5033. The car after making the U turn, stopped at a nearby restaurant and about three to four people came to his aid. The driver of the said car, described to be an Indian man aged between 40-50 came to see the appellant and offered him RM50 for medical expenses. The appellant suffered a fracture on his backbone described as 'compression fracture L1' with no neurological deficit. About three weeks later, on 12 May 2000 the appellant lodged a police report about the accident.

[3] In response, the respondent admitted that he is the registered owner of the Proton Wira No PCT 5033, golden brown in color. On the date and time of the accident, he stated that the car was parked at his house and he kept the key. He was fast asleep at that time. The car key is kept together with a bunch of other keys kept in a drawer which was locked and the key to that drawer is kept in the pocket of his pyjama. According to the defendant it was impossible for others to drive the car that night. He only realised that this car was involved in an accident when he failed to renew the road tax and the car being blacklisted by the Jabatan Pengangkutan Jalan.

THE APPEAL

[4] At the conclusion of the appeal, I find that this is one of those cases

where this court in its appellate jurisdiction should interfere. Having perused the learned sessions judge's grounds of judgment, it is glaring that she has failed to make any conclusion as to the evaluation of the evidence by the witnesses. From her grounds, she merely expresses her doubt as to both the evidence of the plaintiff (appellant) as well as that of the defendant (respondent) and came to the conclusion that because the court was still left in a doubt as to whether the defendant's car was really involved in the accident, the plaintiff claim therefore ought to be dismissed. The learned sessions judge clearly sets too high a standard on the part of the appellant to prove his case. She simply refused to believe that appellant was able to see the registration number of the car that he knocked into. She has also failed to take into consideration the other circumstances of the case in coming to the conclusion whether or not the respondent's car was involved in the accident. Beside the registration number of the car, the make of the car, its colour and the nationality of the driver of the car at the time of the accident were totally disregarded and has not been taken into consideration. There are too many coincidences here that this court in its appellate jurisdiction can not ignore, which the learned trial judge has ignored and not taken into consideration. These are relevant evidence and ought to be considered by the learned sessions judge. There is nothing sinister about the appellant being able to see and remember the registration number of the car which the learned sessions judge found so difficult to accept. Judicial evaluation of the whole evidence in the case was obviously absent. Non-consideration of relevant evidence constitutes 'insufficient judicial appreciation of relevant evidence' which phrase was lucidly explained by the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97. In my view, this failure to consider the other circumstances which constitute relevant evidence is a serious flaw in the sessions judge's decision and merits appellate interference. In *Mst Chameli Debi v Purusattam Singh* AIR 1974 Calcutta 316, Sinha J stated as follows:

> It is well established that failure to consider important evidence or important surrounding circumstances would constitute an error of law and it would be open to this court in that situation to interfere in second appeal.

[5] Failure to consider material and relevant evidence does make an error of law (*Gotham Construction Co v Amulya Krishna* AIR 1968 Calcutta 91).

[6] There are ample authorities both local and foreign which may be cited giving the appellate court powers to interfere with the decisions of trial judges in instances where the decision has been arrived at without any or insufficient judicial evaluation and appreciation of the evidence adduced. One such authority is the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin*

& Anor. At p 115 of the said report, His Lordship Gopal Sri Ram JCA stated as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
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> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
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> In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involve, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. There are several authorities that establish the principle.

(See also, *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and Another Appeal* [1997] 2 MLJ 465; *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *Putra v Sivagnanam & Anor* [1959] 25 MLJ 259; *Benmax v Austin Motor Co Ltd* [1955] AC 370; *Sheo Swarup & Ors v The King Emperor* 51 TLR 10(c).

[7] While admitting that she entertains doubt as to the truth of the respondent's defence especially with regard to the safe keeping of the key and to the fact about the respondent's daughter hearing rumours about the involvement of the respondent's car in the accident, she concluded that the evidence is not totally improbable. Here I pause to state that the inherent probability or improbability of a fact in issue must be the prime consideration. The improbability of the respondent's evidence and likewise his demeanour has not been fully evaluated and appreciated by the learned trial judge. We have a case of a defendant who does not even remember whether he was involved in any accident but categorically denies knocking

into a motorcyclist which occurred four years before his testimony was given in court. The fact that the learned sessions judge believe one witness and not the other does not preclude a closer scrutiny of the evidence by this court. The learned sessions judge has clearly failed to evaluate the respondent's evidence regarding the discrepancy in his evidence relating to how he came to know about the accident as stated in his police report and the version he gave while giving evidence. It is glaring from her judgment that she has failed to fully appreciate that piece of evidence in coming to her conclusion. In his police report which was made about two years after the incident, the respondent stated that he was informed by his daughter that he was involved in an accident with the vehicle No PCX 6015, the appellant's motorcycle. While in evidence, he stated that he only became aware of the accident upon his failure to renew the road tax and after going to the Jabatan Pengangkutan Jalan. In the rekod rayuan tambahan, a statutory declaration made by the respondent on 28 April 2003 which was produced as the defendant's evidence, indicates that he only knew about the accident upon his failure to renew the road tax and after a visit to the Jabatan Pengangkutan Jalan. Clearly there is a contradiction between his statutory declaration and his police report. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. The learned sessions judge has failed to do so (*Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229). In estimating what weight is to be attached to this piece of evidence, the learned sessions judge must have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the respondent's evidence and in particular to the question whether or not he had any motive to conceal or misrepresent the facts. This is what was stated by the court in *Ratna Ammal v Tan Chow Soo* [1966] 2 MLJ 294 in referring to motive as an element which ought to be considered in the appreciation of oral evidence. She has also failed to critically test the evidence of the parties against the totality of their evidence and has not properly analysed the entirety of the evidence which was given before her (see *Chow Kok Beng v Choo Kok Hoe & Ors* [1998] 2 MLJ 29 at pp 168–169).

[8] Perusing the judgment of the learned sessions judge, I am in full agreement with the appellant's counsel submission that the learned sessions judge has failed to make a positive finding which of the evidence, either of the appellant or that of the respondent was accepted. She expresses doubt not only on the appellant's evidence but also that of the respondent's. For the appellant's evidence she said:

> Mahkamah masih meragu-ragui adakah plaintif benar-benar boleh nampak nombor kereta ini? Jikapun plaintiff nampak nombor ini dengan sepintas lalu dalam keadaan cemas demikian, di mana plaintiff terjatuh ditindih oleh motosikal

dan di dalam kesakitan tulang belakang, adakah beliau pasti nombor kereta yang dinyatakan dalam laporan polis ini betul? A

For the respondent's evidence, this is what the learned sessions judge found:

Mahkamah ini sebenarnya juga meragui kebenaran keterangan pembelaan, iaitu fakta defendan menyimpan kunci kereta dalam almari, dan kunci almari pula di simpan dalam poket defendan semasa tidur, serta juga fakta bahawa anak perempuan defendan dengar dari orang luar tentang penglibatan kereta defendan dalam kemalangan in. B

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And she concludes thus:

Pada fikiran mahkamah apa yang lebih penting adalah beban pembuktian tetap terletak pada pihak plaintif. Mahkamah berpendapat, atas imbangan keberangkalian, mahkamah kurang pasti adakah kereta defendan benar-benar terlibat dalam kemalangan ini. Dengan demikian, mahkamah terpaksa menolak tuntutan plaintif dengan kos. D

[9] Clearly, the learned sessions judge has failed to make a finding on the two sets of evidence which are both equally 'meragukan' to her. There is no rejection and/or acceptance of the evidence and the reason for such rejection or acceptance. This runs foul of the requirement that 'a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him'. Although in her judgment she made an observation about the defendant's evidence as 'bukannya satu perkara yang 'improbable' langsung', this to my mind is insufficient as nothing was said of the appellant's evidence. Her consideration, of the evidence, if any, is lopsided and merits criticism. As opined by Shivaraj Patel J of the Indian Supreme Court in *Tek Chand v Dide Ram* AIR 2001 SC 905 at p 916: E F G

No doubt, an appeal court will be slow in disturbing a finding of fact recorded by the trial court based on proper appreciation of evidence but it is also the duty of the appellate court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of law laid down by this court. *More so when there is non-consideration of material evidence and appreciation of evidence is not objective and one sided.* H

(Emphasis added.) I

[10] In *State of Rajasthan v Hanuman* AIR 2001 SC, at p 284, the Supreme Court of India, through the judgment of Mohapatra J held:

A An appellate court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The *sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.*

B (Emphasis added.)

[11] The learned sessions judge has definitely not taken advantage of having heard and seen the witnesses herself. As observed by Edgar Joseph Jr SCJ in *Yusoff bin Kassim v Public Procecutor* [1992] 2 MLJ 183 at p 188:

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In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he D had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt or Thomas v Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

E **[12]** And again, Gopal Sri Ram JCA in the *Lee Ing Chin* case referred to a passage said by Robert Goff CJ in *Armagas Ltd v Mundogas SA; The Ocean Frost*' [1985] 1 Llyod's Rep 1 reiterating thus:

F Furthermore it is implicit in the statement of Lord Mc Millan in *Powell v Streatham Manor Nursing Home* [1934] AC 243 at p 256 that the probabilities and possibilities of the case may impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box.

G **[13]** In my view, the instant appeal is one of such cases where this court is at liberty to intervene and form its own view on the whole of the evidence available.

H **[14]** McElwaine CJ in the case of *Woon Ngee Yew & Ors v Ng Yoon Thai & Ors* [1941] MLJ 37 expressed thus (at p 43):

An appellate court should be very loath to differ on a finding of fact by a court which has seen and heard witnesses, but if the learned judge can be shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong I reason or to have drawn an inference from evidence, which are equally capable of supporting a different inference it may be the duty of an appellate court to interfere.

[15] For those foregoing reasons, the appeal is hereby allowed, with costs to be taxed here and below and the deposit be refunded. Since the appellant is not appealing against the quantum as decided by the learned sessions judge, that order is hereby affirmed.

Appeal allowed with costs.

Reported by Andrew Christopher Simon